

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MILES HALL ,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE
CO. OF PITTSBURGH, PA, a corporation;
ASSOCIATED UNDERWRITERS;
UNITED TRUCKERS ASSOCIATION; and
DOES 1 through 100, inclusive,

Defendant.

CASE NO. 08cv1195 JLS (LSP)

**ORDER (1) GRANTING
DEFENDANTS' MOTION TO
DISMISS THE FOURTH AND
FIFTH CAUSE OF ACTION OF
THE FAC; (2) DENYING
DEFENDANTS' MOTION TO
DISMISS THE SIXTH CAUSE OF
ACTION OF THE FAC; (3)
DENYING DEFENDANTS'
MOTION TO STRIKE**

Plaintiffs filed a First Amended Complaint ("FAC") on April 20, 2009. Defendants now move the Court to dismiss the Fourth, Fifth and Sixth causes of action of the FAC pursuant to FRCP 12 (b)(6) for failure to state a claim. Defendants' also move to strike portions of the FAC pursuant to FRCP 12(f). For the reasons stated below, the Court **GRANTS** defendants' motion to dismiss the fourth and fifth causes of action of the FAC **WITHOUT PREJUDICE**. The Court **DENIES** defendants' motion to dismiss the sixth cause of action of the FAC. The Court further **DENIES** defendants' motion to strike.

BACKGROUND

On February 15, 2007, Robert Hall applied for an occupational accident insurance policy

1 using a form provided by Associated Underwriters, an insurance broker for the trucking industry,
 2 allegedly creating a temporary policy of insurance. (FAC ¶ 10 & Ex. 1.) Miles Hall (“plaintiff”),
 3 Robert Hall’s son, was designated as the sole beneficiary of the policy. (*Id.*) A few weeks later,
 4 on March 6, 2007, Robert Hall died in a trucking accident, and Plaintiff applied for the insurance
 5 benefits under the policy of temporary insurance. (FAC ¶ 11, 12.) However, National Union Fire
 6 Insurance Co. of Pittsburgh, the insurer, instead began making payments to Phyllis Benjamin, who
 7 Plaintiff alleges was the estranged wife of Robert Hall. (FAC ¶ 13.) Subsequently, National
 8 Union paid a \$50,000 lump sum to Plaintiff and has continued to pay \$250,000 in monthly
 9 installments to Benjamin. (FAC ¶ 13.) On November 15, 2007, plaintiff renewed his objection to
 10 payment of policy benefits to Benjamin and reserved his rights to receive payment of all benefits
 11 payable up to the \$1,000,000 limit of liability. (FAC ¶ 15.)

12 Plaintiff filed a lawsuit in San Diego County Superior Court against National Union,
 13 Associated Underwriters, and United Truckers Association (“Defendants”) on June 2, 2008, with
 14 causes of action for (1) declaratory relief; (2) intentional misrepresentation and concealment; (3)
 15 negligent misrepresentation; (4) unfair business practices; (5) breach of contract; and (6) breach of
 16 the duty of good faith and fair dealing. (Doc. No. 1.) The action was removed to this Court on
 17 July 3, 2008. (*Id.*)

18 On July 11, 2008, defendants filed their Answer to the Complaint. (Doc. No. 4.) Plaintiff
 19 filed a motion to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a)(2) on
 20 November 24, 2008. (Doc. No. 14.) A response in opposition to this motion was filed by
 21 defendants on December 24, 2008, and plaintiff filed a reply on December 31, 2008 (Doc. Nos. 17
 22 & 18.) This Court granted Defendants’ request to amend the Complaint on April 13, 2009. (Doc.
 23 No. 23.) Plaintiff subsequently filed his First Amended Complaint (“FAC”) on April 20, 2009.
 24 (Doc. No. 27.) The FAC claimed (1) Declaratory Relief; (2) Breach of Contract; (3) Breach of the
 25 Duty of Good Faith and Fair Dealing; (4) Intentional Misrepresentation and Concealment; (5)
 26 Negligent Misrepresentations; (6) Violation of California Business and Professions Code § 17200
 27 et seq. (*Id.*)

28 On April 30, 2009, defendants filed the present motion to dismiss. (Doc. No. 33.) A

1 response in opposition to the motion was filed by Plaintiff on July 16, 2009. (Doc. No. 37.) A
 2 reply to the opposition was filed on July 23, 2009. (Doc. No. 39.) A hearing was set for July 30,
 3 2009. This was subsequently vacated and the Court took the matter under submission without oral
 4 argument pursuant to Local Civil Rule 7.1(d)(1).

5 **MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)**

6 **I. Legal Standard**

7 Federal Rule of Civil Procedure 12(b)(6) permits courts to dismiss a complaint for two
 8 reasons: (1) lack of a cognizable legal theory or (2) pleading of insufficient facts under an
 9 adequate theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (internal
 10 citation omitted). In reviewing a Rule 12(b)(6) motion to dismiss, the Court must assume the truth
 11 of all allegations of material fact and construe inferences in the light most favorable to the
 12 nonmoving party. *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of the U.S.*, 497 F.3d
 13 972, 975 (9th Cir. 2007). While the complaint need not contain detailed factual allegations, “a
 14 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than
 15 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
 16 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964–65 (2007) (citing *Papasan v.*
 17 *Allain*, 478 U.S. 265, 286 (1986)). In other words, “conclusory allegations of law and
 18 unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Associated Gen.*
 19 *Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (quoting *Pareto v.*
 20 *FDIC*, 139 F.3d 696, 699 (9th Cir. 1998)).

21 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless the court
 22 determines that the allegation of other facts consistent with the challenged pleading could not
 23 possibly cure the deficiency.’” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.
 24 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.
 25 1986)). In other words, where leave to amend would be futile, the Court may deny leave to
 26 amend. *See Desoto*, 957 F.2d at 658; *Schreiber*, 806 F.2d at 1401.

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II. Discussion

A. Fourth and Fifth Causes of Action for Intentional/Negligent Misrepresentation

Defendant moves to dismiss plaintiff's fourth and fifth causes of action for intentional and negligent misrepresentation and concealment, respectively, pursuant to Rule 12(b)(6). Defendant primarily argues that plaintiff has failed to plead actual reliance by plaintiff himself on the alleged misrepresentations. For the reasons stated below, the Court agrees and grants defendant's motion to dismiss the fourth and fifth causes of action in plaintiff's FAC.

To adequately plead fraud in the complaint, plaintiff must assert: “1) a misrepresentation or actionable concealment of fact; 2) knowledge of falsity or the duty of disclosure; 3) intent to defraud or induce reliance; and 4) actual reliance by the plaintiff.”¹ *Mega Life & Health Ins. Co. v. Superior Court*, 172 Cal. App. 4th 1522, 1530 (2009) (citing Cal. Civ. Code § 1709; *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 173 (2003)). “Actual reliance occurs when a misrepresentation is ‘an immediate cause of a plaintiff’s conduct, which alters his legal relations’ and when absent such representation, he would not, in all reasonably possibility, have entered into the contract or other transaction.” *Engalla et al. v. Permanente Medical Group., Inc.*, 15 Cal. 4th 951, 976 (1997) (citations omitted). In this case, defendant correctly asserts that plaintiff cannot adequately plead actual reliance because the FAC contains no allegations that the misrepresentations were made to plaintiff. Therefore, plaintiff could not have acted in reliance upon them. To the contrary, any alleged misrepresentations were made to the policyholder alone during the application process. (See Mem. ISO MTD at 3-5.)

21 California case law supports this holding. In *Mega Life & Health Insurance Co. v.*
22 *Superior Court*, 172 Cal. App. 4th 1522, the court held that the husband of the deceased was a
23 “stranger” to the medical insurance policy in that it “could not have caused him to ‘alter his

25 ¹ Defendant also cites *Mirkin et al v. Wasserman*, 5 Cal. 4th 1082, 1088 (1993) as authority
26 for the proposition that a misrepresentation or concealment must be made directly to the plaintiff in
27 order for plaintiff to rely on those misrepresentations. The *Mirkin* court rejects the “fraud-on-the-
28 market” theory of pleading reliance, arguably finding that one must have “actually read or heard the
alleged misrepresentations [to plead] a cause of action for deceit.” *Id.* at 1089. The Court finds it
unnecessary to discuss *Mirkin*, as the requirement of a plaintiff to plead actual reliance in asserting
fraud or negligent misrepresentation is well settled and more properly illustrated by the other cases
cited and discussed above.

1 position to his injury or risk.”” *Id.* at 1530. Specifically, the husband plaintiff claimed that he had
 2 an individual claim for injury against the insurance company for allegedly failing to cover his
 3 wife’s medical bills. *Id.* at 1525-26. There was no dispute that, as successor in interest, plaintiff
 4 had a claim to receive the proceeds of the insurance plan as his wife was entitled to. *Id.* The issue
 5 was whether plaintiff could plead fraud or misrepresentation even though the misrepresentations
 6 were not made directly to the plaintiff, but rather to his wife. *Id.* at 1526. The court held that
 7 plaintiff did not have a cause of action because he could not plead actual reliance. *Id.* at 1530-31.
 8 Conversely, the alleged misrepresentations were made directly to his wife and, even assuming the
 9 husband encouraged his wife to enter the policy based on these misrepresentations, plaintiff
 10 himself “made no application for insurance and did not receive an allegedly deficient policy or
 11 coverage. He did *not* change his legal position to his detriment.” *Id.* at 1531.

12 Similarly, plaintiff in the present case was not a direct recipient of the misrepresentations,
 13 did not make an application for insurance, and did not actually receive an allegedly deficient
 14 policy or coverage. Accordingly, he did not actually rely on any of the alleged misrepresentations.
 15 Plaintiff contends that *Mega Life* is distinguishable from the present case because he is a named
 16 intended beneficiary to the policy. While this may be true, this does not negate the fact that he did
 17 not enter the policy in reliance on the alleged misrepresentations. In fact, unlike in *Mega Life*,
 18 where the husband played a role in the decision to enter the policy, the plaintiff in this case was
 19 not even aware of the policy until after it had been signed and executed. (See Mem. ISO MTD
 20 n.1.) Accordingly, plaintiff’s attempt to distinguish *Mega Life* is unpersuasive.

21 Defendants also cite *Conroy v. Regents of the Univ. of CA*, 45 Cal. 4th 1244 (2009), for the
 22 proposition that a third party cannot plead reliance on alleged misrepresentations made to another
 23 person. In *Conroy*, both plaintiff and her husband “executed separate agreements to donate their
 24 bodies to the UCI Willed Body Program.” *Id.* at 1247. Upon her husband’s death, plaintiff
 25 properly delivered the body to UCI. *Id.* at 1248. Plaintiff subsequently learned of mistreatment at
 26 the program and instituted an action in state court asserting various claims, including negligent
 27 misrepresentation, fraud and intentional deceit. *Id.* The trial court granted defendants’ motion for
 28 summary judgment, and the Supreme Court of California affirmed. *Id.* at 1256. The Supreme

1 Court asserted that plaintiff's claims failed for two reasons – first, because of lack of any false
 2 representations by defendants and, second, because plaintiff failed to meet the requirements of
 3 “actual reliance.” *Id.* Specifically, plaintiff could not plead reliance because the actual donor, the
 4 party who actually relied on any alleged misrepresentations when entering the contract or
 5 agreement, was the plaintiff’s husband. “Plaintiff did not enter into an agreement with UCI
 6 regarding her husband’s body, nor did [defendant’s] representations cause her to alter her legal
 7 relations with UCI.” *Id.* at 1257.

8 Thus, both *Conroy* and *Mega Life* stand for the proposition that a third party, even an
 9 intended beneficiary, cannot claim reliance on an insurance policy or other agreement which he or
 10 she did not enter into based on misrepresentations made directly to the plaintiff. That is exactly
 11 the situation in this case.

12 Further, plaintiff’s reliance on *Shafer v. Berger et al.*, 107 Cal. App. 4th 54 (2003) and
 13 *Glenn K. Jackson, Inc. v. Richard Roe*, 273 F.3d 1192, 1200 (9th Cir. 2001), for the assertion that
 14 a third party beneficiary can sue an insurance company for negligent misrepresentation is
 15 misplaced. *Shafer* is inapposite to the present case because, in *Shafer*, the alleged
 16 misrepresentations were apparently made directly to the plaintiffs. *Shafer*, 107 Cal. App. 4th at 66
 17 (“After the Shafers [plaintiffs] obtained judgment against Truck’s insureds, La Belle represented *to*
 18 *the Shafers* that Truck did not agree to provide indemnity for wilful acts.” (emphasis added)). In
 19 *Glenn K. Jackson*, the court noted that there was a class of people who can sue an auditor for
 20 negligent misrepresentation; namely, those persons who are “specifically intended beneficiaries of
 21 the audit report who are known to the auditor and for whose benefit it renders the audit report.”
 22 *Glenn K. Jackson*, 273 F.3d at 1200. The court went on to hold, however, that because the third
 23 party did not produce evidence that the auditor “intended to induce reliance on the audit report and
 24 that [the third party] did justifiably rely on the report to its detriment,” it could not recover on a
 25 theory of negligent misrepresentation. *Id.* at 1201. Thus, while this language regarding third party
 26 beneficiaries could arguably apply to an intended beneficiary of an insurance policy, it does not
 27 change the fact that plaintiff in this case did not adequately plead actual reliance on that policy to
 28 his detriment. Accordingly, *Glenn K. Jackson* does not affect this Court’s ultimate holding that
 plaintiff has failed to plead actual reliance.

1 As a result, plaintiff's fourth and fifth cause of action for negligent misrepresentation and
 2 intentional misrepresentation and concealment fails. The Court grants defendants' motion to
 3 dismiss pursuant to Rule 12(b)(6) for these causes of action, with leave to amend.

4 B. Sixth Cause of Action for Violations of California Business & Professions Code

5 California's Unfair Competition Law includes "any unlawful, unfair or fraudulent business
 6 act or practice." Cal. Bus. & Prof. Code § 17200. Section 17200 is broad, borrowing from
 7 violations of other laws and making these violations independently actionable as an unfair
 8 competition claim. *See Cal-Tech Comms. Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th
 9 163 (1999). Section 17200 is limited to claims for injunctive relief or restitution. *Korea Supply*
 10 *Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143-44 (2003).

11 Defendant first argues that plaintiff cannot recover under § 17200 because plaintiff already
 12 has an adequate remedy at law. Defendant claims that, "with respect to insurance policies and
 13 beneficiary rights, the beneficiary must plead, ... [that] plaintiff has no adequate remedy at law."
 14 (Opp. to MTD at 6, 7 (citing *Heighley v. J.C. Penny Life Ins. Co. et al.*, 257 F. Supp. 2d 1241,
 15 1259-60 (C.D. Cal. 2003); *Stewart v. Life Ins. Co. of N. Am.*, 388 F. Supp. 2d 1138, 1144 (E.D.
 16 Cal. 2005)).) Therefore, defendant asserts, because plaintiff also seeks monetary relief under his
 17 claims of breach of contract, declaratory relief, and breach of the implied covenant of good faith
 18 and fair dealings, he has adequate remedies at law to recover his alleged policy benefits. The
 19 Court disagrees. Plaintiff is not seeking monetary damages or restitution under § 17200. Rather,
 20 plaintiff is clearly seeking an injunction. (FAC ¶ 72.) Thus, while the breach of contract and
 21 breach of the implied covenant of good faith and fair dealings may provide plaintiff with monetary
 22 damages, it will not provide him with the injunction he is seeking under his § 17200 claim.

23 Defendant further alleges that plaintiff has not plead an adequate basis for seeking
 24 injunctive relief in the FAC. Again, the Court disagrees. Plaintiff has sufficiently plead an
 25 ongoing need for injunctive relief. Plaintiff has not only asserted that the "unlawful practices
 26 alleged above are continuing in nature and are widespread practices," plaintiff has supported this
 27 statement with factual allegations. Specifically, plaintiff has alleged that defendants continuously
 28 issue applications for insurance using language that is designed to induce entities to purchase the
 insurance believing they are receiving benefits different from what they are in fact receiving.

1 Defendants then deny “benefits based on language concealed, mislabeled, and not disclosed in the
 2 application.” (FAC ¶¶ 63-68.) These factual contentions adequately support plaintiff’s request
 3 that “an injunction be issued against Defendants, and each of them, to enjoin them from continuing
 4 to engage in the unlawful conduct.” (FAC ¶ 72.)

5 Defendants’ third argument that plaintiff has no standing to bring a § 17200 claim also
 6 fails. Defendant asserts that “[f]ollowing passage of Proposition 64, to have standing to bring suit
 7 under the Unfair Competition Act, a plaintiff must make a twofold showing, [sic] he or she must
 8 demonstrate an injury in fact and a loss of money that is directly caused by the alleged unfair
 9 competition claimed.” (Mem. ISO MTD at 11 (citations omitted).) The Court finds that plaintiff
 10 has adequately plead both injury in fact and loss of money. The FAC alleges that plaintiff himself
 11 was injured and lost money as a result of the unfair business practices because defendants failed to
 12 pay him policy benefits that were owed to him under the policy, and further alleges that defendants
 13 are continuing to engage in unfair business practices in their applications for insurance as provided
 14 to other possible purchasers. These allegations are sufficient to support plaintiff’s standing to
 15 bring a § 17200 claim.

16 Next, defendant argues that “Plaintiff is not permitted to usurp jurisdictional authority
 17 vested in state’s regulatory agencies or to impose regulatory requirements on foreign corporate
 18 entities.” (Mem. ISO MTD at 12 (citing *Employee Serv. Assoc. v. Stafford Gray, as Ins. Commr.*,
 19 243 Cal. App. 2d. 817 (1996).) Specifically, defendant claims that plaintiff’s allegations concern
 20 licensing and corporation formation issues, which are reserved to state agencies, not persons in
 21 plaintiff’s position. The Court finds this argument to be baseless. The FAC does not implicate
 22 these issues and therefore the usurpation of state regulatory authority is irrelevant.

23 Defendants’ sixth argument² is that certain allegations fall within the scope of the Unfair
 24 Insurance Practices Act, and that “[r]e-casting Unfair Insurance Practices Act allegations[] under
 25 the guise of a section 17200 claim is not permitted under *Moradi-Shalal* and properly ordered
 26 dismissed.” (Mem. ISO MTD at 13 (citations omitted).) However, defendants offer no further
 27 basis for its bald conclusion that the allegations asserted as a violation of § 17200 actually fall

28 ² The Court has already addressed defendants’ fifth argument, which is that plaintiff has no
 29 cognizable remedy afforded under § 17200 (restitution or injunction).

1 under certain provisions of the Unfair Insurance Practices Act.³ The FAC certainly does not
 2 explicitly indicate that this is so. Accordingly, without further explanation by defendants, this
 3 argument fails.

4 Defendants' final argument is that the Unfair Competition claim must fail because the
 5 "borrowed laws" which were allegedly violated, resulting in unfair competition, fail. The
 6 "borrowed laws" plaintiff claims were violated are Insurance Code §§ 780 and 781 and the
 7 Consumer Legal Remedies Act §§ 1770(9), (14), (16), and (19). Defendants cite *Cal-Tech*
 8 *Comms. Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163 (1999) and *Smith v. State*
 9 *Farm Mutual Auto Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001) as their authority for stating that, if
 10 the underlying violations fail, as does the overall unfair competition claim. However, in reading
 11 these cases, it is clear that a § 17200 Unfair Competition claim can be predicated on either
 12 unlawful *or* unfair practices. Therefore, it is irrelevant whether the specific statutes named in the
 13 complaint were violated, so long as the other alleged acts were "unfair." *See Cal-Tech*, 20 Cal. 4th
 14 at 180; *State Farm Mutual*, 93 Cal. App. 4th at 718-19. The Court, therefore, declines to address
 15 the specific statutes cited in the FAC. The remaining alleged acts are sufficient to support
 16 plaintiffs' claim against defendants for a violation of California's Business and Professsions Code
 17 § 17200.

18 For the reasons stated above, defendants' arguments are without merit and the Court denies
 19 defendant's motion to dismiss the sixth cause of action pursuant to Rule 12(b)(6).

20 **MOTION TO STRIKE PURSUANT TO RULE 12(F)**

21 Defendants also move the Court to strike the "temporary insurance" allegations in the
 22 General Allegations and First, Second, and Third Causes of Actions in the FAC. (Mem. ISO MTD
 23 at 4, 15-17.)

24 **I. Legal Standard**

25 Under FRCP 12(f), a court "may order stricken from any pleading any insufficient defense
 26 or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Proc. 12(f). A
 27 Rule 12(f) motion may also be used to "strike any part of the prayer for relief when the damages

28 ³ Specifically, defendants contend that the alleged acts fall within the scope of Cal. Ins. Code
 §§ 790.03(h)(1), (3), (8), (9), (13), the Unfair Insurances Practices Act.

1 sought are not recoverable as a matter of law.” *Bureerong v. Uvewas*, 922 F.Supp. 1450, 1479
 2 n.34 (C.D.Cal. 1996). However, “motions to strike pursuant to Rule 12(f) are disfavored.” *Estate*
 3 *of Migliaccio v. Midland Nat'l Life Ins. Co.*, 436 F.Supp. 2d 1095, 1100 (C.D.Cal. 2006). Thus,
 4 “[i]f there is any doubt as to whether the allegations might be an issue in the actions, courts will
 5 deny the motion.” *In re 2TheMart.com, Inc.*, 114 F.Supp. 2d 955, 965 (C.D.Cal. 2000).

6 **II. Discussion**

7 In the FAC, plaintiff alleges that the deceased (alleged) policy holder was covered under a
 8 policy of Temporary Insurance which designated plaintiff as his beneficiary upon his death. (FAC
 9 ¶¶ 17, 22, 28.) In support of defendants’ motion to strike the temporary insurance policy
 10 allegations, defendants have lodged as exhibit A to their motion to strike a copy of a “group
 11 policy.” Essentially, defendants rely on this policy to support their contention that there was no
 12 possibility of the existence of a temporary insurance policy because the final policy was already
 13 bound prior to the policyholder’s death. (Mem. ISO Mot. at 16.) This copy of the policy was not
 14 attached to plaintiff’s complaint, but has only been brought before the court by defendants as an
 15 attachment to their motion to strike. Thus, in order for the court to consider the document, the
 16 doctrine of incorporation by reference must be met.

17 The Ninth Circuit has set out when a doctrine may be incorporated by reference when it is
 18 attached to a *motion to dismiss* under FRCP Rule 12(b)(6), but not attached to the FAC. *See*
 19 *Knievel v. ESPN*, 393 F.2d 1068, 1076 (9th Cir. 2005). Plaintiff asserts, however, that its
 20 “research has not identified any cases which have held that the doctrine of incorporation by
 21 reference is applicable to a defendant’s *motion to strike* under FRCP 12(f).” (Opp. to MTD at 10
 22 (emphasis added).) Defendants do not attempt to contest this and do not provide the Court with
 23 any authority that the Court may properly consider the attached policy as it is referred to in the
 24 motion to strike under the incorporation by reference doctrine. Without the Court being able to
 25 refer to the document, defendants’ motion to strike fails. Accordingly, the Court denies
 26 defendants’ motion to strike pursuant to Rule 12(f).

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CONCLUSION

2 For the reasons stated below, the Court **GRANTS** defendants' motion to dismiss the fourth
3 and fifth causes of action of the FAC **WITHOUT PREJUDICE**. Plaintiff **SHALL FILE** any
4 amendment to the FAC within 30 days of this Order being electronically docketed.

5 The Court **DENIES** defendants' motion to dismiss the sixth cause of action of the FAC.

6 The Court further **DENIES** defendants' motion to strike.

8 || IT IS SO ORDERED.

10 | DATED: December 8, 2009

Janis L. Sammartino
Honorable Janis L. Sammartino
United States District Judge